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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

SAMUEL HENG,

Defendant and Appellant.

B212924

(Los Angeles County
Super. Ct. No. NA063421)

APPEAL from a judgment of the Superior Court of Los Angeles County, Arthur H. Jean, Jr., Judge. Affirmed with modifications.

Verna Wefald, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lance E. Winters and Susan D. Martynec, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant, Samuel Heng, appeals from his convictions for: two counts of lewd acts with a child under 14 (Pen. Code,¹ § 288, subd. (a)); one count of lewd act with a child of 14 or 15 (§ 288, subd. (c)(1)); and one count of sexual penetration with a person under 18. (§ 289, subd. (h).) Defendant argues he was denied his rights to due process and a speedy trial. The Attorney General argues that additional court security fees should have been imposed. We impose three additional court security fees and affirm the judgment.

We view the evidence in a light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Elliot* (2005) 37 Cal.4th 453, 466; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.) D.D. was 21 years old at the time of trial. When D.D. was eight or nine years old, she lived with her family in Signal Hill. D.D.'s father brought defendant from Cambodia. Defendant was D.D.'s cousin. Defendant lived in a converted garage of D.D.'s home. D.D.'s aunt, V.C., visited almost daily at their Signal Hill home. Defendant taught karate to D.D. and her brothers.

After defendant lived in D.D.'s home for a while, he asked her if she wanted a massage. Initially, D.D., who was 9 or 10 years old, did not think there was anything wrong with being massaged. Thereafter, defendant began to feel D.D.'s breasts under her clothing and "played" with her vagina. These massages took place after D.D. returned home from school in the converted garage. Defendant massaged D.D. on more than 10 occasions with no one else present. D.D. slept in the living room on a pullout couch with some of her brothers. Occasionally, V. C. also slept on the couch with D.D. Defendant kissed D.D. on her lips one night as she slept. Defendant put his tongue in D.D.'s mouth. D.D. woke up. D.D. was frightened. When D.D. asked defendant what he was doing, he said: "Oh, nothing. Just go back to sleep." D.D. got up and rinsed her mouth. D.D. told her parents what occurred. D.D.'s father got mad at defendant. But D.D.'s mother defended defendant. Thereafter, defendant continued to massage D.D. and play with her clitoris two to three times a week.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

D.D. told V.C., about defendant's conduct. D.D. said defendant was "feeling on" her. D.D. said defendant put his hand down her pants and touched her vagina. D.D. also said that defendant repeatedly told her he loved her as he massaged her. Defendant also told D.D. that he wanted to marry her.

After a year or two, D.D. began to feel that it was inappropriate for defendant to massage her. D.D.'s family and defendant moved to Long Beach during her freshman year in high school. D.D.'s father did not move with them. D.D.'s mother and defendant had moved as a couple. D.D.'s mother was pregnant. Thereafter, defendant began to masturbate in front of D.D. Around this time period, D.D. told her parents that defendant had kissed her. D.D.'s mother said that defendant was just being affectionate. D.D. then believed it was "okay." D.D. told V.C. what occurred at the Signal Hill house. D.D. told V.C. not to tell anyone. D.D. said she was embarrassed and afraid defendant would hit her. Defendant told D.D. that he would kill her if she told anyone. D.D. believed defendant because he had a gun in his room.

D.D. had her own room at the Long Beach house. After the computer was moved into her room, D.D. moved into the master bedroom. Defendant had been coming to D.D.'s room every two or three weeks when she was asleep. Defendant stood over D.D. When D.D. awoke, defendant would tell her to go back to sleep. D.D. could lock the door to the master bedroom. Defendant would masturbate when D.D. was at the computer. Defendant would take his penis out of his shorts and "play with himself" in D.D.'s words. This occurred on more than one occasion.

One afternoon after D.D. moved to the master bedroom, defendant unlocked her door, locked himself inside the room with her and threatened her with a knife. D.D. was at the computer. Defendant unbuttoned D.D.'s pants. When D.D. began screaming, defendant took out the knife and held it against her neck. Defendant told D.D. to be quiet or he would kill her. D.D. was afraid because she believed he would use the knife against her. Defendant attempted to get inside D.D.'s pants with his hands. D.D. pushed defendant. D.D. and defendant fell to the floor. Defendant had D.D. get on her knees. D.D. complied because she was afraid. Defendant rubbed his erect penis against D.D.'s

buttocks over her clothing. Defendant reached into D.D.'s jeans and placed his fingers in D.D.'s vagina and moved them. Eventually, defendant released D.D. Defendant told D.D. not to say anything. D.D. told her boyfriend about what happened. On the same day, D.D. told V.C. what had happened. D.D. told both of them not to say anything because she was afraid. D.D.'s mother was happy and in love with defendant. D.D. did not want to hurt her mother's feelings.

At one time, defendant questioned D.D. and her brothers about a missing bullet from his gun. Defendant told D.D. that if he didn't find the bullet he would have to hurt someone. D.D. was scared. On another occasion, D.D. caught defendant reading a letter V.C.'s boyfriend sent. The letter had been marked to D.D. Defendant was angry because D.D. received a letter from "a guy." Defendant began yelling at D.D. In response D.D. yelled at defendant for reading her letters and pushed him. Defendant punched D.D.'s body. D.D.'s brothers were home at the time. D.D. told her boyfriend what had occurred. The shoving incident occurred while D.D. was in high school.

Defendant was jealous. Defendant would not allow D.D. to go out. Defendant called D.D. a "whore." Defendant told D.D. that he did not want her to be with anybody else. Defendant said that if D.D. had a boyfriend, he would kill him. Defendant called D.D.'s boyfriend. Defendant threatened to kill D.D.'s boyfriend. Defendant also made a veiled threat to D.D. She described the threat thusly: "[T]hat I have to be cautious and be aware because you never know, something about a guy that's in black. And then he will kill us." D.D. knew the reference by defendant to the "guy in black" was to himself. D.D. was frightened.

As D.D. became older, defendant continued to stop her from leaving the house by threatening her. Defendant "[kept] tabs on [her]" by writing down what time she left, who she was with, and what she wore. While in high school, D.D. told her uncle that defendant was jealous of her. D.D. told her uncle defendant said he loved her, went through her letters and would not leave her alone. D.D. moved in with the uncle when she was approximately 17 years old. D.D.'s uncle called the police. D.D. spoke with the police in 2004. D.D. told the officer everything that had happened except for defendant's

threats. Thereafter, D.D. spoke with a representative from the Children and Family Services Department on more than one occasion. D.D. denied telling any social worker anything about the molestation. D.D. testified, "I told them to leave me alone." The social worker, an unidentified man, asked D.D. about the allegations she had made to the police. D.D. denied she was molested to the social worker. D.D. explained why she lied to the social worker: "Because my mom told me to lie. And I wanted her to be happy." But D.D. told her mother what had happened.

In 2006, D.D.'s mother became ill and ultimately died. D.D. visited her mother at the hospital in Westminster daily. D.D. visited the hospital daily. D.D. described a conversation with defendant at the hospital: "Well, in my mom's room, she was halfway gone already. And he said that he just loves me and my mom." D.D. still struggled with trying to put her experiences with defendant behind her at the time of trial.

Defendant's sole contention on appeal is that he was denied a speedy trial and as a result his constitutional due process rights were violated. Defendant filed a dismissal motion for delay in prosecution alleging that the complaint in this case was filed on October 29, 2004. Defendant was not arrested until April 27, 2008. Defendant argued that he was prejudiced as a result of the delay because D.D.'s mother had died and was no longer able to testify on his behalf. Defendant repeated these allegations at the hearing on the dismissal motion. Los Angeles Police Detective Jennifer Kearns testified that she was the investigating officer in this case. D.D. first reported the offenses on August 20, 2004. A complaint was filed on October 29, 2004. An arrest warrant was issued the same day. Detective Kearns spoke to: D.D.; D.D.'s uncle; V.C.; and D.D.'s aunt. Detective Kearns learned that defendant had fled to Cambodia when he learned of these charges. D.D.'s mother would neither return Detective Kearns's telephone calls nor answer the door. Detective Kearns learned that defendant sold his Honda automobile to get money to survive in Cambodia.

Detective Kearns went to defendant's address on 65th Street. However, no one answered the door. Detective Kearns entered the arrest warrant into the national data base, believing if defendant returned to the United States he would be detained on that

warrant. Detective Kearns also advised D.D. and her family members to notify the police if they had information regarding his whereabouts. Detective Kearns believed the family would cooperate because they were all fearful of defendant. Defendant had made threats to family members. Detective Kearns believed defendant was in Cambodia. In 2008, Detective Kearns learned that defendant had been arrested in Buena Park. Detective Kearns was unaware that defendant received a traffic citation in 2006 or changed his address in April 2007. Detective Kearns believed that the federal immigration authorities would have been alerted to defendant's warrant when he reentered the United States.

Defense counsel argued that D.D.'s mother had been adamant that the sexual misconduct allegations were untrue. Defendant conceded that he left the country for Cambodia but then returned. Defense counsel argued that if the police had been more diligent in running driver's license checks and the like, an arrest would have occurred sooner and minimized the delay in prosecution. Defense counsel reiterated that D.D.'s mother could have been interviewed regarding the motive for the allegations. The prosecutor argued that D.D.'s mother was never a percipient witness to the alleged sexual acts. In addition, others that lived in the home during the time in question, could testify that they never saw any of the acts themselves.

In denying the motion, the trial court ruled: "It seems to me that Detective Kearns did what she was supposed to do. She got information from multiple family members that [defendant] was in Cambodia. You concede that he in fact was in Cambodia What else is she to do at that point? She put the warrant into the system. That system includes the federal aspect to it. And she relied on law enforcement, federal or otherwise, immigration or otherwise, to make an arrest should [defendant] return to the country. That's not an unreasonable position to take in my view. [¶] Beyond that, I am going to guess that she is a busy person. We see our police forces stretched very thin on too many occasions. Does the law really require her to pick up the file every couple of months and go out and do all this all over again and again having put into the system and having relied on the feds to do their job? [¶] I think she did what was expected. [¶] Secondly, I don't see any prejudice in this case. I don't know how the victim's mother would testify

that nothing happened. Sexual assaults, after all, child molestation, after all, takes place in private, in darkness and away from the prying eyes of people who could put a stop to it. So to say that the woman saw nothing hardly diminishes or hardly makes her a valuable witness. [¶] As to her speculation as to the child's motive, other than being mere speculation, I don't see that it is anything more than that. So respectfully your request to dismiss for pre-arrest delay is denied."

Both the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 15 of the California Constitution guarantee the right to a speedy trial. (*Klopfer v. North Carolina* (1967) 386 U.S. 213, 222-223; *People v. Harrison* (2005) 35 Cal.4th 208, 225; *Rhinehart v. Municipal Court* (1984) 35 Cal.3d 772, 776.) The United States Supreme Court held that the purpose of the Sixth Amendment speedy trial protection is to: prevent undue pretrial incarceration; minimize anxiety concerning public accusation; and to reduce the possibilities that long delay will impair the ability to conduct the defense of an accused. (*United States v. Marion* (1971) 404 U.S. 307, 320; *People v. Martinez* (2000) 22 Cal.4th 750, 760.) The Sixth Amendment right to a speedy trial does not apply to the period before an accused is formally charged. (*United States v. MacDonald* (1982) 456 U.S. 1, 6-9; *United States v. Marion, supra*, 404 U.S. at p. 313; *People v. Martinez, supra*, 22 Cal.4th at p. 759; *People v. Archerd* (1970) 3 Cal.3d 615, 639.) The California Supreme Court has held that the filing of a felony complaint does not trigger a defendant's federal speedy trial protection. (*People v. DePriest* (2007) 42 Cal.4th 1, 26; *People v. Horning* ((2004) 34 Cal.4th 871, 891; *People v. Martinez, supra*, 22 Cal.4th at pp. 754-755, 763-765.) Our Supreme Court has explained: "Under the *state* Constitution, by contrast, the filing of a felony complaint is sufficient to trigger speedy trial protection. [Citations.]" (*People v. Martinez, supra*, 22 Cal.4th at p. 765; see also *People v. DePriest, supra*, 42 Cal.4th at p. 27.) Our Supreme Court held: "However, 'when a defendant seeks dismissal based on delay after the filing of the complaint and before indictment or holding to answer on felony charges, a court must weigh "the prejudicial effect of the delay on defendant against any justification for the delay.'" [Citations.] No presumption of prejudice arises from delay after the filing of the

complaint and before arrest or formal accusation by indictment or information [citation]; rather, the defendant seeking dismissal must affirmatively demonstrate prejudice [citation].’ [Citation.]” (*Ibid.*, quoting *People v. Martinez*, *supra*, 22 Cal.4th at pp. 766-767.) Here the felony complaint was filed on October 29, 2004. Defendant immediately fled the country and was not arrested, indicted, or officially accused in a court of law. As a result, defendant’s federal speedy trial rights were not violated.

Defendant acknowledges that federal speedy trial rights do not attach upon the filing of the felony complaint. However, defendant argues that his federal and state speedy trial rights were violated because of Detective Kearns’s failure to repeatedly check on his whereabouts, thereby resulting in “severe” prejudice. Defendant admittedly fled the country at approximately the same time the felony complaint was issued. The trial court could reasonably find he did so to avoid prosecution. Detective Kearns performed all of the duties required to insure defendant was apprehended at the first available opportunity. A valid arrest warrant was lodged in the national system to detect defendant’s return through immigration or police agencies. In fact, defendant was eventually arrested as a result of that warrant when he received a traffic citation. Moreover, we are unpersuaded by defendant’s claim that he was prejudiced because D.D.’s mother could not testify on his behalf. As noted D.D.’s mother had died. As the prosecutor argued in the trial court, D.D.’s mother was not a percipient witness to the sexual acts. Others living in the family home at the time of defendant’s sexual acts with D.D., including her younger brothers, could also testify that they were unaware of any such activity. Defendant has not demonstrated that purposeful delay can be attributed to the government. (See *People v. Nelson* (2008) 43 Cal.4th 1242, 1256 [“A court may not find negligence by second-guessing how the state allocates its resources or how law enforcement agencies could have investigated a given case”]; see also *People v. Dunn-Gonzalez* (1996) 47 Cal.App.4th 899, 915.) As a result, the trial court could reasonably deny his speedy trial motion.

Following our request for further briefing, the parties acknowledge that the trial court should have imposed a section 1465.8, subdivision (a)(1) court security fee as to

each count. (See *People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1327-1328 [§ 1465.8 fee “is mandated as to “every conviction,”” even if the sentence on a conviction was stayed. [Citation.]”]; *People v. Crittle* (2007) 154 Cal.App.4th 368, 371 [same]; *People v. Schoeb* (2005) 132 Cal.App.4th 861, 865-866.) The trial court only imposed one such fee. Three additional section 1465.8, subdivision (a)(1) court security fees are imposed. The trial court is to personally insure the abstract of judgment is corrected to comport with the modifications we have ordered. (*People v. Acosta* (2002) 29 Cal.4th 105, 109, fn. 2; *People v. Chan* (2005) 128 Cal.App.4th 408, 425-426.)

The judgment is modified to include three additional \$20 section 1465.8, subdivision (a)(1) court security fees. The judgment is affirmed in all other respects.

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TURNER, P. J.

We concur:

ARMSTRONG, J.

MOSK, J.